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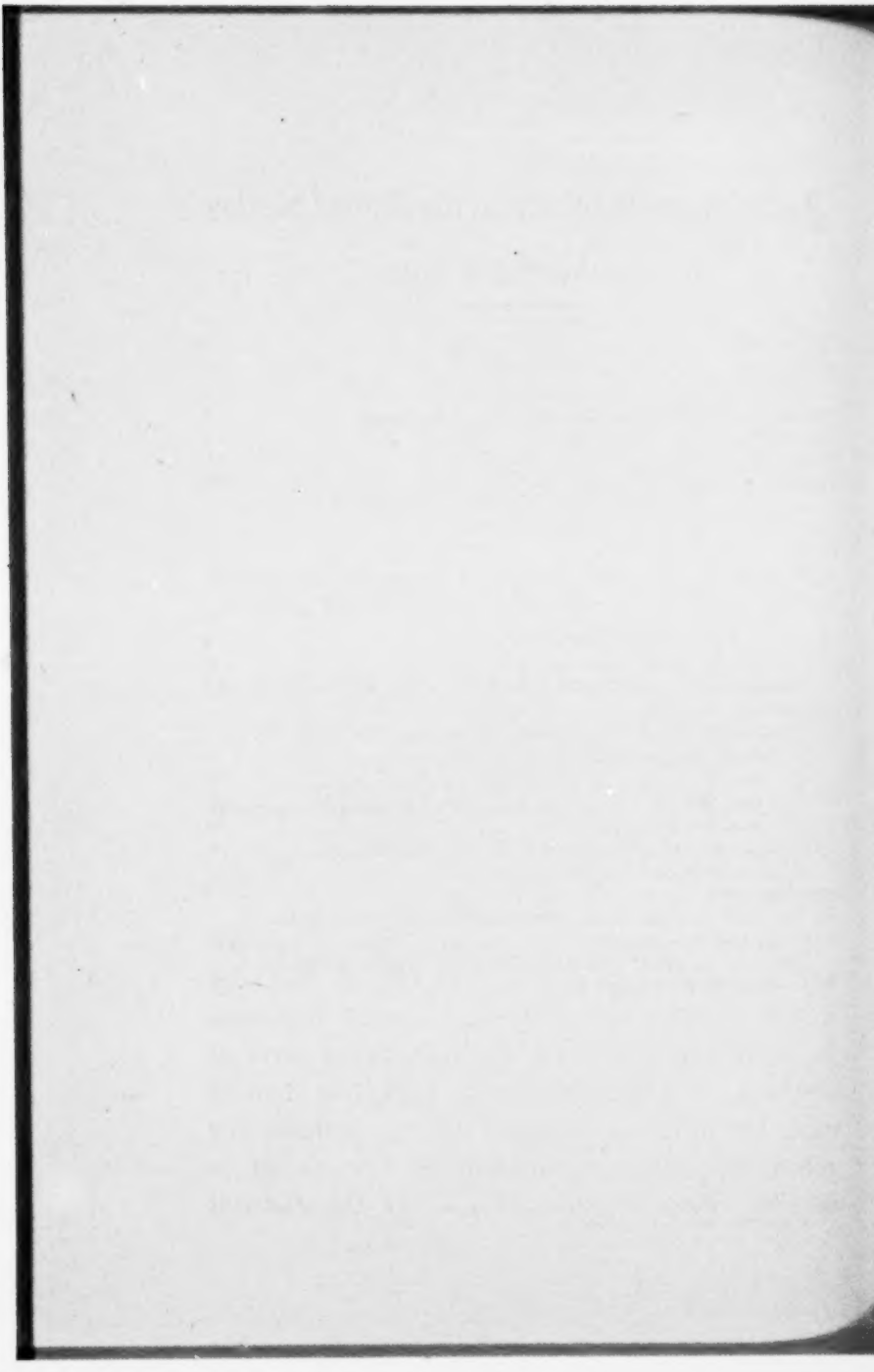

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 995

T. A. SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 50–54) is reported at 153 F. 2d 144.

JURISDICTION

The judgment of the circuit court of appeals was entered January 25, 1946 (R. 54–55), and a petition for rehearing was denied February 26, 1946 (R. 55). The petition for a writ of certiorari was filed March 25, 1946, less than 30 calendar days after denial of the petition for rehearing. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.[1]

QUESTION PRESENTED

Whether a general verdict of "guilty" on an information charging a "sale" of whiskey by petitioner at a price in excess of the ceiling price established under the Emergency Price Control Act will support a conviction, where the jury was instructed that the proof did not as a matter of law support the charge of a sale but that they could find petitioner guilty if they found an attempt to sell.

STATUTE INVOLVED

The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended, provides in pertinent part:

> SEC. 4. (a) (50 U. S. C.App., Supp. IV, 904 (a)). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under

[1] The petition is timely whether it be governed by Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934, or by Rules 37 (b) (2) and 45 (a) of the new Rules of Criminal Procedure, which became effective March 21, 1946.

section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 205. (b) (50 U. S. C. App., Supp. IV, 925 (b)). Any person who willfully violates any provision of section 4 of this Act, * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

Section 1035 of the Revised Statutes (18 U. S. C. 565) provides:

> In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense.

STATEMENT

An information was filed against petitioner in the District Court for the Northern District of California charging that he did willfully "sell" 100 cases of whiskey at a price in excess of the maximum price established by Maximum Price Regulation No. 445 (8 F. R. 11161), in violation of the Emergency Price Control Act of 1942 (R. 2–3). Petitioner was found "guilty" and he was sentenced to imprisonment for 6 months (R. 10–

11). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the conviction was affirmed (R. 54–55). The undisputed evidence[2] may be summarized as follows:

In early October 1943, at Redwood City, California, petitioner, business manager of the local bartenders' union, discussed with F. W. Larkin, a tavern owner, the possibility of getting some whiskey for the latter (R. 19). About October 5, 1943, petitioner returned to Larkin's place of business and told him that he could get hold of 100 cases of of Baltimore Club Special Reserve whiskey at a price of $46.50 per case (R. 19, 31). Under Maximum Price Regulation 445 the then effective ceiling price for that whiskey was approximately $27.00 per case.[3] Petitioner was aware of the approximate ceiling price (R. 26, 32). Larkin contacted two other tavern keepers who also needed whiskey and the three collectively gave checks totalling $2,940, or $19.75 per case, to petitioner as a down payment for the 100 cases he agreed to obtain (R. 19–20, 30, 32). The balance of the money was to be collected when Larkin obtained the whiskey at the local warehouse where it was

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[2] Petitioner did not offer any evidence in his own behalf (see R. 34).

[3] Section 5.4 (b) of Maximum Price Regulation 445, applicable to this transaction, establishes a wholesaler's ceiling of net cost plus 15% markup. Testimony showed that this would be between $26.60 and $27 per case for the particular whiskey (R. 16–17).

allegedly stored (R. 20). Larkin was unable to get the whiskey when he went to this warehouse, the persons in charge there stating that they knew nothing about the transaction with petitioner (R. 20). The fact was that the whiskey could not be released because of an existing restraining order (R. 17, 33). Thereafter, petitioner visited Larkin's place of business and returned the down payment of $2,940 (R. 23).

At the close of the testimony, the trial judge told counsel out of the presence of the jury, that he was going to "tell the jury that there was no sale but there was an attempted sale" of the liquor in question (R. 35), and thereafter in charging the jury, the judge instructed them, *inter alia,* as follows:

> I instruct you that the facts adduced at the trial do not support the charge in the information that the defendant made an actual sale of whiskey to said Larkin, because he at no time had title to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an [33] abortive sale or a contract to sell goods which the seller was unable to carry out.
>
> In all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged,

> if such attempt be itself a separate offense. (R. 36.)
>
> * * * * *
>
> Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him. (R. 38.)

At the close of his charge, the judge had the clerk give the jury the usual form of verdict, which read, "We, the jury, find the defendant, T. A. Small, the defendant at bar," followed by a blank line for the verdict itself and another blank line for the signature of the foreman. No exceptions were taken to the court's charge or to the form of verdict. (R. 41.) The jury returned a general verdict of guilty (R. 6–7).

ARGUMENT

Petitioner urges that the general verdict of "guilty" must be construed solely in the light of the information, which charged petitioner with having made a "sale" in violation of the Emergency Price Control Act and regulations

issued thereunder, and that, so construed, the verdict was contrary to the binding instructions of law delivered by the trial judge (Pet. 5–7). Petitioner argues that the trial judge's instruction of law that there was no sale, whether or not erroneous, was binding on the circuit court of appeals as well as the jury and that the verdict cannot be supported on any conclusion of law to the contrary (Pet. 7–9). He further argues that in any event the law of sales supports the trial judge's charge that there was no sale in this case (Pet. 10–13).

Petitioner's conclusion that the jury in effect ignored the judge's instruction that there was no sale can be arrived at only by tortured construction of the verdict. It is true that the information charged the defendant only with a sale, but the judge gave the jury clear and unequivocal instructions under which they could not consider the question of sale but could only find petitioner guilty if they concluded there was an attempt to sell. Without objection or exception, the case went to the jury with the issues thus clearly framed for them. And again without objection or exception, the jury was given a form of verdict which lent itself only to the addition by the jury of the words "guilty" or "not guilty." Thus, examination of all the relevant circumstances preceding the verdict can lead only to the conclusion that the jury found petitioner guilty of an attempt to sell within the limitations

of the instructions that had been given them. Cf. *Freeman* v. *United States,* 96 F. 2d 13 (C. C. A. 5).

The only authority cited by petitioner in support of his construction of the verdict is *St. Clair* v. *United States,* 154 U. S. 134 (Pet. 6), in which this Court held that a general verdict of guilty on an indictment for murder was to be construed to import a conviction for that offense only, even though the jury might have found the defendant guilty of some lesser crime necessarily included within the one charge. But the *St. Clair* case factually was far different from the instant one. There was nothing in that record, and particularly in the trial judge's charge to the jury which, as in the instant case, narrowed the issue for the jury so that its verdict must be construed other than with respect to the indictment alone. Moreover, the entire opinion in that case, relevant portions of which are omitted in petitioner's quotation, shows that in construing a verdict one must look to the entire record to find the jury's intention. Immediately preceding the portion of the opinion quoted by petitioner (Pet. 6), this Court stated as follows (154 U. S. at 154):

> * * * We said in *Pointer's case* that, while the record of a criminal case must state what will affirmatively show the offence, the steps without which the sentence cannot be good, and the sentence itself, all parts of the record must be interpreted to-

> gether, giving effect to every part if possible, and supplying a deficiency in one part by what appears elsewhere in the record. 151 U. S. 396, 419.

There can be no question here as to the validity of the verdict, construed as a finding that petitioner was guilty of an attempt to sell. Under R. S. § 1035, 18 U. S. C. 565 (*supra,* p. 3), a defendant may be found guilty under an information charging a sale in violation of the Emergency Price Control Act, if found guilty of an attempt to commit the offense so charged, since an attempt to sell at a price in excess of the ceiling price is a distinct offense under Section 4 (a) of that Act, and under Section 205 (b) thereof, carries the same degree of punishment as an illegal sale (*supra,* pp. 2–3).

While we have no doubt that the verdict is not open to the construction contended for by petitioner, if petitioner felt that it was, he should have raised the question before the jury was dismissed. See *Grace* v. *United States,* 4 F. 2d 658, 662 (C. C. A. 5), certiorari denied, 268 U. S. 702; *Jay* v. *United States,* 35 F. 2d 553, 554–555 (C. C. A. 10). His failure to take prompt action to correct the claimed ambiguity in the verdict is in effect a waiver of such claim.

In any event, the instruction given by the trial judge that there was no sale was one to which petitioner was not entitled, since the statute under which he was charged expressly includes his ac-

tivities within the definition of the word "sale." Section 302 (a) of the Emergency Price Control Act[4] defines the term "sale" to include "contracts and offers to [sell]." Petitioner's activities in respect of which he was charged clearly fall within this inclusive definition of "sale." *United States* v. *Weiss*, 150 F. 2d 17, 19 (C. C. A. 2). Whether, under the general law of sales as applied to the facts of this case,[5] he may be said to have made a contract to sell or merely an offer to sell, he made a "sale" within the coverage of the controlling definition of the Act and, therefore, the jury's verdict is fully supportable even if it were to be construed as responsive only to the charge as set forth in the information.

CONCLUSION

The decision below is correct, and there is involved no question of importance or real conflict

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[4] This section, 50 U. S. C. App., Supp. IV, 942 (a), provides:

"(a) The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer,' shall be construed accordingly."

[5] The gist of petitioner's argument with reference to the law of sales is that there was no sale here because title had not passed and, in fact, petitioner was unable to obtain any liquor to pass to the tavern keepers. However, these facts would not under the general law of sales preclude the conclusion that there was a sale where all the elements of a contract of sale existed. *United States* v. *Weiss*, 150 F. 2d 17, 19 (C. C. A. 2).

of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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